IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 394

In the Matter of the Application of DANIEL F. O'BRIEN and LEONARD CASSAT, and others named in the schedule annexed hereto,

Petitioners,

vs.

THEODORE H. LANG as Personnel Director of the Department of Personnel of the City of New York and as Chairman of the Civil Service Commission of the City of New York, GEORGE GREGORY, JR., and ANTHONY M. MAURIELLO, as Commissioners of the Civil Service Commission of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

The petitioners pray that a writ of certiorari issue to review the order of the Court of Appeals, State of New York, entered in the above case on May 2d, 1963.

Opinions Below.

There was no opinion delivered in the Court of Appeals, State of New York, which affirmed the order of the Appellate Division of the State of New York, First Department.

whose opinion is reported in 18 App. Div. 2d (N. Y.) 140, 237 N. Y. Supp. (2) 960. The order of the Appellate Division reversed an order of the Supreme Court of the State of New York, at Special Term, New York County, which granted the petition in all respects. The opinion at Special Term is not reported.

Jurisdiction.

The order of the Court of Appeals, State of New York, was entered on May 29, 1963. The jurisdiction of this Court is invoked under Title 28 of the United States Code, 1257 (3).

Questions Presented.

Is it in the nature of *ex post facto* legislation and a deprivation of due process of law for a Civil Service Commission to fail forty-six lieutenants in the Police Department, City of New York, candidates in an examination for promotion to captain, after they had passed the examination, by raising the pass mark from 70% to 75% ten months after the holding of the examination?

Is it due process of law for the Court below to invalidate an official announcement of the examination with a required pass mark of 70% on the ground that it did not meet the requirement of a Rule of the Civil Service Commission that the announcement of the examination be published daily in full for at least one week while reinstating an earlier announcement of a 75% pass mark which likewise had not been published daily in full for at least one week?

Is it a denial of equal protection under the laws for the Court below to validate an announcement of an examination for the exclusive benefit of eleven candidates who

were permitted to participate in the examination by virtue of that announcement while holding that the announcement was void insofar as the petitioners are concerned?

Constitutional Provisions Involved.

No person shall "be deprived of life, liberty, or property, without due process of law; . . ." Constitution of the United States, Amendment 5.

No State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Constitution of the United States, Amendment 14.

Statement.

The forty-six petitioners, lieutenants in the Police Department of the City of New York, seek a judicial determination that having earned passing marks on the examination for promotion to Captain, they are entitled to placement upon the eligible list.

Petitioners were failed on the examination because the respondents (hereinafter referred to as the Commission) privately changed the official pass mark from 70% to 75% ten months after the examination. The petitioners were informed of the raised pass mark more than twelve months after they had taken the examination.

The question was presented in the petition to the Court of first instance whether the Commission's *ex post facto* increase of the pass mark constituted a deprivation of due process of law. The petition alleged:

> "26. The *ex post facto* increase of the passing grade from 70% to 75% constituted a deprivation of due process of law" (Record, folio 42).

Special Term, the Court of first instance, sustained the petitioners' contention and held:

"A fixing of a passing mark almost ten months after the examination was held is improper." (Record, folio 255).

However, the Appellate Division unanimously reversed the order of Special Term which had granted the petition in all respects. The Court of Appeals without opinion unanimously upheld the order of reversal.

The opinion of the Appellate Division observed:

> "The petitioners contend there was an *ex post facto* increase of the passing grade from 70% to 75%, and this constituted a deprivation of due process of law. . . .
>
> "The appeal thus poses an issue as to the power of Commission to vary a passing grade once it announces such grade by publication, and a subsidiary question whether any of such rights vested in petitioners under the original 70% notice that any alteration in the rating requirement constituted an unjust and illegal deprivation. Also, whether, as petitioners contend, there was in fact an *ex post facto* increase." (Record, folios 281, 283).

The examination was originally announced with the traditional pass mark of 70%. A second announcement corrected errors in the original announcement but restated the 70% pass mark. A third announcement changed the mark to 75% for the first time in the history of such examinations. However, the day before the examination, a fourth announcement reinstated the 70% passing grade. While the examination booklet specified 75%, the petitioners justifiably relied upon the notice given by the announcement which concededly determines the pass mark. *Borodkin* v. *Kern*, 174 Misc. 339, aff'd. 260 App. Div. 914, aff'd. 285 N. Y. 732.

To justify the reversal of Special Term, the Appellate Division voided the fourth announcement on a ground

never contended" the Commission; namely, that it did not comply with a Commission rule requiring publication "daily, in full for at least one week" (Rule 4.1.3). Indeed, the reduced period of publication shortly before the holding of the examination was consistent with the Commission's established practice.

The Court thereupon reinstated the prior passing mark of 75%, of which, the Court erroneously assumed, "due notice had been given" (Record folios 290, 291). The fact is that the 75% announcement was published in full for only six days. As appears from the issues of *The City Record* where the announcements were published, the six days of full publication were followed by a bare reference to the issues containing full publication.

The only announcement meeting the Court's construction of Rule 4.1.3, *supra*, was the second with eight days of full publication of a 70% pass mark.

The Appellate Division's invalidation of three 70% announcements to sustain a single 75% announcement which itself as a matter of public record was not published "daily, in full for at least one week", and the affirmance by the Court of Appeals, constitute a deprivation of due process of law.

While invalidating the final announcement so as to sustain the Commission's failing of the petitioners, the Appellate Division, as affirmed in the Court of Appeals, validated this announcement for the benefit of eleven other candidates who were permitted to file under this announcement, one of whom has recently been promoted to Captain. The validation of the final announcement, termed the Third Amended Notice, for the special benefit of the eleven candidates is apparent from a Commission affidavit annexed to its answer submitted in the Court of first instance, where it is said:

> "Thereafter, a 'Third Amended Notice' (Petitioners' Exh. 'E') was readvertised permitting other filings of applications of additional candidates who had in the meantime become eligible to take the examination since the insertion of the last advertisement. Eleven such persons were accommodated under this 'Third Amended Notice'." (Record, folio 142).

The opinion of the Appellate Division recited:

> "Commission pointed out that 812 applicants filed under the original notice, 78 filed thereafter under the 75% requirement, and 11 under the 'Third Amended Notice'." (Record, folio 280).

Despite the patent denial of equal protection in thus validating the final announcement for the eleven who filed under it while voiding it where the petitioners are concerned, the Court of Appeals affirmed the Appellate Division.

Reasons for Granting the Writ.

In the performance of their duties as high police officers, the petitioners are ever conscious of the constitutional rights of the individual. The instant petition raises serious questions of due process and equal protection determining the civil right of the officers themselves to advancement in their careers in the civil service.

In a case on all fours with the instant one, but where the Appellate Division and the Court of Appeals reached the opposite conclusion, Mr. Justice Walter expressed the shock to his sense of injustice as follows:

> "The fixing of a passing grade after an examination has been had and the papers graded strikes my mind as fundamentally unjust and as affected

with all the abhorrence usually felt for retroactive legislation or for the constitutionally prohibited ex post facto laws."

"I have had some difficulty in putting into words just why I feel it is unjust, and perhaps all I can say is that at least some persons go into an examination with the predetermined passing mark in mind and with the intention of beating that mark and relax their efforts after feeling that they have beaten it instead of continuing to do their very best until the end of the examination. But there are some questions in the law with respect to which a page of history is worth more than a volume of logic (New York Trust Co. *v.* Eisner, 256 U. S. 345, 349; Cardozo, Nature of Judicial Process, pp. 54, 55); and so, too, there are times when one's sense of justice is a better guide to decision than one's ability to reason." *Gilbert* v. *Kroll*, 17 Misc. 2nd 409; 1 App. Div. 2nd 819, aff'd 2 N. Y. 2nd 896.

The Court of Appeals of the State of New York, in its determination of the due process and equal protection issues presented by the instant case, has not acted in accord with the decisions of the Supreme Court of the United States.

Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

William Goffen,
Counsel for Petitioners.

Appendix A.

OPINION OF APPELLATE DIVISION.

STEVENS, J.:

This is an appeal from an order entered June 1, 1962, which granted petitioners' application and, *inter alia*, directed the Civil Service Commission (herein Commission) to accord to each petitioner the passing mark to which he is entitled in the written examination for promotion from Lieutenant to Captain, Police Department, City of New York.

This is a proceeding for an order under Article 78 of the Civil Practice Act directing Commission to recognize a passing mark of 70 percent on a promotional examination.

Prior to January 21, 1961, the date of the examination herein involved, petitioners were lieutenants in the Police Department and eligible to take an examination for promotion to the position of Captain. The original notice of examination stated applications would be received from October 5, 1960 through October 25, 1960, for the written test to be held January 21, 1961, and that a passing grade of 70% would be required for the written examination. The notice was published in "The City Record", the official journal of the City of New York, from October 5, 1960 to October 11, 1960. From October 11, 1960, to October 25, 1960, an "Amended Notice" of the examination was so published which likewise set forth a requirement for a passing grade of 70%.

During the period from December 12, 1960 through December 23, 1960, after many of the petitioners had filed, a "Second Amended Notice" was published which raised the required passing grade in the written test to 75%.

On January 20, 1961, the day before the examination, a "Third Amended Notice" appeared which stated the requirement for a passing grade to be 70%.

Appendix A.

On January 21, 1961, the day of the examination, a statement appeared on the cover page of the examination booklet that 75% was required on the written test.

These petitioners took the examination and received grades of between 69.1% and 73%. Pursuant to General Examination Regulation E.17.3 of the Commission, "Whenever the pass mark in the rating of a test . . . has been fixed in terms of a specific numerical score, a candidate who obtains a rating within any fractional part above the next lower whole number shall be deemed to have passed such test, subject, part or examination as the case may be." Thus all candidates who received a grade of 69.1% to 69.9% would have been deemed to have passed a written examination on which the pass mark is 70%.

The petitioners assert that in November, 1961, Commission unlawfully established a pass mark of 75% for the written examination. Commission asserts the publication of a 70% requirement in the "Third Amended Notice" which appeared one day prior to the examination was an error which was not discovered until November 1961, and after discovery Commission, on December 5, 1961, duly affirmed 75% to be the correct pass mark, and the insertion of 70% to have been an error.

Commission pointed out that 812 applicants filed under the original notice, 78 filed thereafter under the 75% requirement, and 11 under the "Third Amended Notice."

The official notices of failure were mailed to petitioners on or about December 28, 1961.

The petitioners contend there was an *ex post facto* increase of the passing grade from 70% to 75%, and this constituted a deprivation of due process of law. Also, the action of Commission was unjust, arbitrary, capricious and illegal.

Special Term held the "fixing of a passing mark almost ten months after the examination is improper" and granted petitioners the relief sought.

Appendix A.

On appeal, Commission urges "[t]he petition should properly have been dismissed. The Commission had the power and the duty to correct its own clerical error and in the absence of bad faith or palpable illegality, its judgment and decision relating to the conduct of a civil service examination should not be disturbed."

Petitioners reassert the contentions advanced below. A brief *amici curiae* was submitted in support of Commission's position by certain candidates who passed the Police Captain's Promotion Examination.

The appeal thus poses an issue as to the power of Commission to vary a passing grade once it announces such grade by publication, and a subsidiary question whether any or such rights vested in petitioners under the original 70% notice that any alteration in the rating requirement constituted an unjust and illegal deprivation. Also, whether, as petitioners contend, there was in fact an *ex post facto* grade increase.

Commission has the power to prescribe, amend and enforce suitable rules to carry out the provisions of the Civil Service Law and of ~~Section 6, Article 5, New York~~ State Constitution, including rules for examinations, appointments, promotions, transfers, etc. (Civil Service Law, §20; Rule II, Rules and Regulations City Civil Service Commission). Such rules when properly adopted shall have the force and effect of law (Civil Service Law, §20, subd. 2; *Matter of Woods* v. *Finegan*, 286 App. Div. 271; *Cazzivoglio* v. *Hamlin*, 202 N. Y. S. 2d 402, aff'd 13 A D 2d 614, appeal den. 13 A D 2d 899).

Pursuant to the power vested in it Commission promulgated Rule 4, Section 5, paragraph 3 of such Rule provides in part "[u]nless otherwise specified by resolution or regulation of the commission, candidates must attain a final examination rating of not less than seventy per cent in an examination in order to be placed upon an eligible list for certification and appointment." (See also, Regulation E. 17.1)

Appendix A.

Commission in its initial notice did indicate that a passing rating of 70% was essential. Subsequent thereto, in December 1960, and as a result, at least in part, conversations with the then Police Commissioner who expressed concern that this rating was less than the 75% established for the Sergeants written examination Commission did otherwise specify, and directed that the pass mark be set at 75% instead of the 70% already advertised. This it had the power to do (Rules and Regulations, Civil Service Commission, Rule 4.5.3). Thereafter it extended the time during which applications could be filed.

The director of examinations also has the power to fix the required passing rating in any test, subject or part of an examination "*at not later than the time of the holding thereof*" (Rule 4.5.3); (emphasis supplied.) This power is properly vested in the director (New York Charter, Ch. 35, §813; Rule II, Rules and Regulations, City Civil Service Commission).

Since Commission has the power to alter the passing rating required prior to the examination, it follows there is no vested (i.e., fixed, accrued, settled) or absolute right in petitioners resulting merely from a publication of the passing grade required. Thus insofar as the original, the amended, or even the "Second Amended Notice" is involved, no right vested upon publication.

Commission has power to prescribe examinations for a competitive class, to issue an announcement setting forth the minimum qualifications required and it is required to "advertise such examination in such manner as the nature of the examination shall require" (Civil Service Law, §50; Rules and Regulations, City Civil Service Commission, Rule II). "The date of the first assembled test in a promotion examination [as here involved] shall be stated in the announcement of examination" (Regulations, City Civil Service Commission, E.12.1). "Such announcement shall be published daily, in full for at least one week prior to the final date for the receipt of applications in The City Rec-

ord"; and in such other publications as the director may designate . . . announcements shall also be posted conspicuously in the offices of the department of personnel" Rule 9.1.3, (Rules and Regulations, City Civil Service Commission). "The date of all subsequent tests in promotion examinations and all tests in open competitive examinations shall be published in The City Record and conspicuously posted in the offices of the department of personnel for a period of not less than ten days in advance of the scheduled date of the test. The personnel department, however, reserves the right to change the date of any test" (*ibid*, Regulation E.13.2). Such publication and posting constitute public notice (*ibid*, Regulation E.13.3).

Under the Rules and Regulations of Commission the appearance, as a rating, of 70% in the "Third Amended Notice" of January 20, 1961, one day before the examination, did not conform to its own requirements of publication for at least one week prior to the examination and was ineffectual to change the passing rating of 75%, of which due notice had been given. It could hardly be argued, if such notice of January 20, 1961, had contained a rating of 80%, that petitioners would have been bound thereby, since it did not conform to Commission's existing rules. Moreover, the raising of the requirement to 75% had been duly and properly passed and published so that all parties were on notice, actually or constructively, of the change. If any doubt existed it must have been dispelled by the appearance of the required rating on the examination booklet for all of the published notices directed the applicants' attention to the question booklet. The purpose of publication is to afford reasonable notice of the requirements of a proposed examination. Commission recognizes this by its own requirement of at least one week's publication of notice.

Commission has wide discretion in fixing the minimum requirements for admission to an examination (*Matter of Wirzberger* v. *Watson*, 305 N. Y. 507; *Chapin* v. *Schechter*, 23 Misc. 2d 190, aff'd 13 A D 2d 473; *Jacob* v. *Schechter*, 22 Misc. 2d 549) and in the absence of bad faith, corrupt,

or illegal action, or action erroneous in law, it should not be interfered with (*cf. Matter of Kinnerney* v. *Hornell Civil Service Comm.*, 262 App. Div. 39). Commission also has the power to vary the pass mark. (Rule 4.5.3; Regulation E.17.1, Rules and Regulations, City Civil Service Commission.)

Merit is the basis for appointment and promotion in competitive civil service, and the ascertainment of such merit, so far as practicable, is to be by competitive examination. (State Constitution, Art. V, §6; Civil Service Law, §§44, 52; Rules of City Civil Service Commission, Rule 5.4.5.) All applicants for the January 21, 1961, examination were treated exactly alike, with all being required to meet the same minimum requirements, including the 75% pass mark. Thus it is not for us to substitute our judgment for that of Commission (*cf. Matter of Kornbluth* v. *Reavy*, 261 App. Div. 60) where its action is clearly not illegal or unreasonable.

Petitioners, after asserting the 70% pass mark was the correct one, charge that Commission illegally, arbitrarily and capriciously changed the passing grade after the holding of the examination.

Commission asserts the January 20, 1961, publication of 70% was error; neither party discovered the error until November 1961, and Commission immediately, or in a very short time, on December 5, 1961, duly affirmed the 75% to be the correct pass mark, and the insertion of 70% to be error. Commission "at any time prior to the establishment or during the existence of an eligible list, may correct any manifest error or mistake made in connection with an examination; on its own initiative [as was done here] or in the granting of a claim of manifest error or mistake. The nature of such manifest error or mistake shall be set forth in its minutes" (Rule 4.5.4, Rules of Commission).

The error complained of here in no wise affected the competitive nature of the examination, nor did it discriminate between one applicant or group of applicants

over the other. The error was corrected prior to the promulgation of the eligible list on March 7, 1962, and before the failure notices were mailed out on or about December 28, 1961. The record is barren of any indication of improper motives or bad faith on the part of the Commission and the error may properly be corrected (*cf. People ex. rel. Finnegan* v. *McBride*; 226 N. Y. 252). There is nothing to show Commission knew of or anticipated the effect of the correction on petitioners, or acted with any intention of particularly or unfairly affecting any one of the applicants. The power of correction would seem to be limited only where fraud, illegality or bad faith is shown, or such ambiguity exists that it is impossible to have a sufficiently objective standard for determination (*cf. Matter of Gruner* v. *McNamara*, 298 N. Y. 395; *People ex rel. Finnegan* v. *McBride*, *supra*; *Matter of Blumenthal* v. *Morton*, 273 App. Div. 497, aff'd 298 N. Y. 563). And where the announcement of examination failed to state a requirement of an eyesight standard of 20/40 in each eye, it was held the State Civil Service Commission was not estopped from fixing such eyesight standard after petitioners successfully passed the written examination and had met the experience qualifications for the position (*Matter of Eisig* v. *Conway*, 198 Misc. 770; see also, Rule 4.3.6; Regulations E.16.2; E.21.1).

Matter of Dowling v. *Brennan* (284 App. Div. 563), cited by petitioners, is not to the contrary, for that case dealt with a failure of the Commission to provide material information to applicants in advance of the examination, and its failure to give objective assurance of the application of certain factors in the absence of a showing that it was not possible or impracticable to do so. In *Matter of Gilbert* v. *Krull*, 17 M. 2d 409, aff'd 1 A. D. 2d 819, aff'd 2 N. Y. 2d 896, there was a raising of the passing grade in a practical test in violation of a by-law of defendant, without previous notice to the petitioners, and after it had knowledge of their identities and had graded their papers.

Appendix A.

There was no vested right in petitioners to a 70% pass mark and when properly done, Commission, as previously pointed out, could raise such mark to 75% (*cf. Matter of Kornblith* v. *Reach*, 261 App. Div. 60). The pass mark of 75% was properly fixed. The single publication on January 20, 1961, was ineffective to change such rating for the reasons heretofore stated. If any error existed it was within Commission's power to correct the same and such power existed at the time the correction was made.

The order appealed from is reversed on the law, and the petition dismissed, without costs to either party.

Rabin, J. P., McNally, Steuer and Noonan, JJ., concur.

OPINION OF SPECIAL TERM.

Gold, J.: This is an article 78 proceeding to direct the respondents to recognize the passing mark of 70 per cent. on a promotional examination. On October 5, 1960, the respondents announced an examination of promotion and set forth a passing mark of 70 per cent. on the written examination to be held on January 21, 1961. On December 12, 1960, a second amended notice appeared in "The City Record" amending the passing mark from 70 per cent. to 75 per cent. Thereafter on January 20, 1961, a third amended notice appeared reinstating the 70 per cent. passing mark. On January 21, 1961, the day of the examination, although the last passing mark announced was 70 per cent. a statement appeared on the cover page of the examination booklet stating that 75 per cent. was required on the written test. In November, 1961, the respondent held that the passing mark was 75 per cent., stating that the third notice of January 20, 1961, was an error and that they fixed 75 per cent. as the passing mark (petitioners' exhibit "G"). A fixing of a passing mark almost ten months after the examination was held is improper. Accordingly, the petitioners are entitled to the relief sought. The motion is granted.

Appendix B.

ORDER.

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur May 29, 1963.

No. 80.

In the Matter of the Application of DANIEL F. O'BRIEN & ors., For an Order &c.,

Appellants,

vs.

THEODORE H. LANG, as Personnel Director of the Department of Personnel of the City of New York &C., & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 20th day of March, in the year of our Lord one thousand nine hundred and sixty-three, Daniel F. O'Brien & ors., the appellants in this cause,

came here unto the Court of Appeals, by William Goffen, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Theodore H. Lang, as Personnel Director of the Department of Personnel of the City of New York &C., & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William Goffen, of counsel for the appellants, and by Mr. John A. Murray, of counsel for the respondents, and by Mr. Chester S. Mandel, of counsel for the amici curiae, and after due deliberation had thereon, did order, and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded with according to law.

Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, May 29, 1963.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

(SEAL)